FILE COPY

Office - Supreme Court, U. S
FILED
JUL 31 1937
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1936

No. 274

SAINT PAUL MERCURY INDEMNITY COMPANY,
Petitioner,

vs.

RED CAB COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT
and
BRIEF IN SUPPORT THEREOF

BURKE G. SLAYMAKER,
Indianapolis, Indiana,
Attorney for Petitioner.

SLAYMAKER, MERRELL & LOCKE,
Indianapolis, Indiana,
Of Counsel for Petitioner.

CENTRAL PUBLISHING COMPANY, INDIANAPOLIS, INDIANA

IN THE

Supreme Court of the United States

October Term, 1936

SAINT PAUL MERCURY INDEMNITY COMPANY,
Petitioner,

vs.

RED CAB COMPANY,
Respondent.

No. .....

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioner Saint Paul Mercury Indemnity Company comes and respectfully prays that a writ of *certiorari* issue to review the judgment of the United States Circuit Court of Appeals for the Seventh Circuit, entered on the 18th day of June, 1937, ordering the cause remanded to the State court for lack of federal jurisdiction (R. p. 75), on which day the said Court of Appeals, without a written opinion, overruled the petition of your petitioner for a rehearing, the original opinion of said Court of Ap-

peals having been filed on the 12th day of April, 1937 (R. p. 44), which said petition for rehearing, supported by briefs, was filed by your petitioner on the 24th day of April, 1937 (R. p. 47).

STATEMENT OF THE CASE

This action was commenced by respondent against petitioner and one Myron S. Harlan in the Superior Court of Marion County, Indiana, at Indianapolis, and was by petitioner removed to the United States District Court for the Southern District of Indiana upon a petition by petitioner for removal and was duly docketed in the said District Court (R. p. 64).

The complaint filed in the State court (R. p. 75) alleged that your petitioner executed to respondent petitioner's written binder of Workmen's Compensation Insurance (R. p. 61), by which binder petitioner insured respondent against liability for workmen's compensation. The binder was not limited in amount of insurance granted. The complaint in the State court alleged (R. p. 59) that as a direct and proximate result of the petitioner's breach of said written binder of Workmen's Compensation Insurance, respondent had been required to pay, and had become obligated to pay, its employees workmen's compensation, including medical, hospital and dental bills, in connection with injuries suffered by its employees, to the damage of the respondent in the sum of Four Thousand Dollars ($4,000). The prayer of the complaint in the State court was that respondent have judgment against petitioner for $4,000 for its damages and that the co-defendant Harlan be restrained from transferring out of his possession to petitioner any moneys of the petitioner which might come into the possession of said Harlan (R. p. 60).

The petition for removal (R. p. 64) filed in the State court by your petitioner alleged that the respondent Red Cab Company was an Indiana corporation, with its principal office at the City of Indianapolis, in said State, and that said respondent was a citizen and resident of the State of Indiana; that your petitioner is a corporation organized and existing under the laws of the State of Minnesota, with its principal office at the City of St. Paul, in said State, and that it is a citizen and resident of the State of Minnesota; that the co-defendant, Myron S. Harlan, was a citizen and resident of the State of Indiana, but that no apparent or probable cause of action was alleged by the complaint against said Harlan; that said Harlan was not interested in the action, that his only relation to the matter was that he was the agent of petitioner, who as its agent executed the written binder sued on, that said Harlan was an unnecessary party to the action, was fraudulently joined to defeat the right of your petition to remove this cause to said District Court, that such suit involved a separable controversy between your petitioner and said respondent and that a complete determination of the controversy between petitioner and respondent can be had without the presence of said Harlan. In other words, the petition for removal set forth in proper form and due substance that (a) the said Harlan was fraudulently joined to defeat petitioner's right of removal, and (b) there was a separable controversy between petitioner and respondent.

The petition for removal alleged the amount in controversy exceeded, exclusive of interest and costs, the sum of Three Thousand Dollars ($3,000). (R. p. 64.)

After the cause was removed to, and docketed in, the said District Court, respondent dismissed its action as to the said Harlan. (R. p. 9.) When the judgment was

rendered, respondent was sole plaintiff and your petitioner was sole defendant in the action. (R. p. 9.)

While the case was pending in the District Court, respondent filed its second amended complaint (R. p. 3) on the same written binder (R. p. 6), in which it alleged the same contract of insurance and alleged its damages to be in the same amount of $4,000, and prayed judgment against your petitioner for $4,000 and for all other proper relief.

With respondent's amended complaint filed in the District Court, respondent filed a bill of particulars of its damages (R. p. 7), by which bill of particulars respondent set forth the amount of its loss under the binder sued on to be $1,380.89. There was no bill of particulars filed with the complaint in the State court. The facts in the case are, therefore, that when the action was commenced in the State court the plaintiff in the action sued on contract for $4,000 of unliquidated damages; but after the case had been docketed in the federal court, the plaintiff in the action filed a second amended complaint alleging its damages to be $4,000, but filed in the federal court a bill of particulars showing itemized damages of $1,380.89.

The Circuit Court of Appeals reversed the judgment (Opinion, R. p. 44) with directions to the District Court to remand the case to the State court wherein it was begun, because the Court of Appeals was of the opinion the federal court was without federal jurisdiction. The sole ground upon which the Court of Appeals rested its judgment that there was not federal jurisdiction was that there was absent the necessary jurisdictional amount in controversy. The Circuit Court of Appeals refused to decide the assignments of error properly presented to it by petitioner as appellant, on the sole ground that there

was absent such federal jurisdiction, because of an insufficient amount in controversy.

The transcript of the record before the Court of Appeals, when it gave its original opinion, did not contain the complaint filed in the State court, the petition for removal, the bond on removal and the notice of the petition and bond, that is, the transcript did not contain the transcript on removal from the State court (R. p. 1).

After the written opinion of the Court of Appeals, filed April 12, 1937, was announced, your petitioner filed with the Court of Appeals its petition for a writ of *certiorari* for diminution of the record (R. p. 49), praying to have certified by the District Court to the Court of Appeals a copy of the transcript on removal, which petition for *certiorari* was granted by the Court of Appeals (R. p. 54) and the writ of *certiorari* prayed for was issued. The Clerk of the District court made due return to the writ of *certiorari* for diminution of the record (R. p. 56) and certified to the District Court a complete copy of the transcript on removal (R. p. 57).

The trial by jury was waived by the written stipulation of the parties in the District Court (R. p. 17), the cause was tried by the court without a jury (R. p. 18), a special finding of facts and conclusions of law (R. p. 19) were made and judgment thereon was rendered in favor of respondent against petitioner for $1,162.98 (R. p. 25).

QUESTIONS PRESENTED

The questions presented by this petition for the writ of *certiorari* are:

1. Whether or not the fact of jurisdiction on removal is determined by the state of the facts shown by the com-

plaint of the plaintiff in the State court at the time of the removal, or by an amendment of the complaint in the Federal court after removal.

2. Whether the Circuit Court of Appeals has decided a federal question of substance, namely, a question of federal jurisdiction, not in accord with, but diametrically opposed to, the following applicable decisions of the Supreme Court, namely:

Kirby v. American Soda Fountain Co., 194 U. S. 141;
Cooke v. United States, 2 Wall. 218.

Clearly the decision of the Circuit Court of Appeals is not in accord with the said applicable decisions of the Supreme Court.

3. Whether the Circuit Court of Appeals can lawfully refuse to decide the assignments of error properly presented to it, upon the ground that there is no federal jurisdiction, where the amount in controversy is sufficient under the allegations of the complaint in the State court, and where, therefore, federal jurisdiction is shown by the record to exist.

4. Whether the Circuit Court of Appeals may lawfully refuse to decide assignments of error properly presented to it, on the ground that there was no federal jurisdiction because the amended complaint filed in the federal court, after the removal of the cause, showed, by a bill of particulars therewith filed, the amount of damage to be less than three thousand dollars ($3,000), where, by the complaint filed and on file in the State court at the time of the removal, the amount in controversy was more than three thousand dollars, exclusive of interest and costs.

REASONS FOR GRANTING THE PETITION

1. The Circuit Court of Appeals decided that federal jurisdiction was shown by the record not to exist, ordered the cause remanded to the State court, and refused to consider any of petitioner's errors set forth in petitioner's assignment of errors.

The action as commenced in the State court was for the recovery against petitioner of four thousand dollars of unliquidated damages for breach of a written contract of workmen's compensation insurance, in an unlimited amount, executed and delivered by petitioner to respondent. The petition for removal alleged the amount in controversy to exceed $3,000 exclusive of interest and costs. The amount in controversy, as alleged in the petition for removal, was never denied by respondent. The respondent's damage was positively alleged in the complaint to be four thousand dollars. No bill of particulars of such damage was filed in the State court. The petition for removal alleged and showed, and respondent never, in either the State court or in the federal District Court, denied that there was (a) a separable controversy between respondent and petitioner or (b) that the resident defendant was fraudulently joined. In the federal court there was a voluntary dismissal as to the resident defendant.

There was clearly federal jurisdiction shown by the record in the State court at the time of removal, because the complaint filed and on file in the State court, at the time of removal, and the petition for removal, showed the amount in controversy to be four thousand dollars.

The existing federal jurisdiction at the time of removal was not lost or destroyed by the fact that, after the re-

moval, in the federal District Court, the respondent filed an amended complaint with a bill of particulars of his damage showing respondent's damage and loss to be less than $3,000.

Federal jurisdiction of a cause removed from a State court, insofar as the amount in controversy is concerned, is determined by the state of the record in the State court at the time of the removal.

Amending the complaint in the federal court after removal, by reducing the amount of damage alleged, and of the recovery sought, below the jurisdictional amount does not defeat the federal jurisdiction theretofore actually acquired. The District Courts throughout the Seventh Circuit, in virtue of the present decision of the Court of Appeals, if it shall become final, are now compelled to remand every removal cause when, after the removal, the complaint shall have been amended to reduce the damages sued for to $3,000 or less. Thus is destroyed the right of defendants to the exercise of federal jurisdiction. Thus are destroyed all rights of defendants whose cases are thus erroneously remanded, even to present the question of jurisdiction to the Court of Appeals on appeal, and to come to this court on petition for certiorari for the correction of so fundamental an error. The situation as to jurisdiction in removal causes in the Seventh Circuit is, therefore, such as to require the intervention of the Supreme Court, if the error of the Circuit Court of Appeals ever shall be corrected, and warrants the granting of the writ now prayed for in the instant cause.

2. The Supreme Court, in the cases of *Kirby v. American Soda Fountain Co.*, 194 U. S. 141 and *Cooke v. United States*, 2 Wall. 218, decided that when the jurisdiction of

the federal court has once attached, a subsequent change in the amount in controversy does not divest the federal court of jurisdiction. Such decisions of the Supreme Court are applicable here. The decision of the Circuit Court of Appeals in the case at bar is not in accord therewith, but directly opposed thereto.

3. The Circuit Court of Appeals could not lawfully refuse to consider and decide petitioner's errors assigned in the Circuit Court of Appeals, because the record showed that the Circuit Court of Appeals and the District Court had jurisdiction of the cause. The errors assigned by petitioner, none of which the Circuit Court of Appeals considered and decided, were that the facts found by the special findings of facts did not support the judgment and the law was with the petitioner, that the District Court erred in each of its conclusions of law on its special findings of facts, and erred in refusing to make petitioner's requested declarations of law on the special findings. (R. p. 31.)

The refusal of the Circuit Court of Appeals to decide the petitioner's assignments of error presented to it deprived the petitioner of its day in court.

4. If the Circuit Court of Appeals had proceeded to decide petitioner's assignments of error, unimpeded by the erroneous view that because of the absence of the amount in controversy necessary to federal jurisdiction there was lacking federal jurisdiction, it would have been compelled to accept petitioner's contentions (a) that the facts found by the District Court in its special finding of facts showed that the law was with the petitioner and (b) that the Circuit Court of Appeals should direct the District Court to re-state its conclusions of law on the special findings of facts and to render judgment for petitioner. Instead

the District Court was directed to remand the cause to the State court.

For the foregoing reasons it is respectfully submitted that this petition should be granted.

BURKE G. SLAYMAKER,
Indianapolis, Indiana,
Attorney for Petitioner.

SUBJECT INDEX OF BRIEF IN SUPPORT OF PETITION

Page

Opinions of the Courts Below 13

Jurisdiction 13

The Facts 14

Specification of Errors 16

Argument 18

LIST OF CASES CITED

Baltimore, etc., R. Co. v. United States, 279 U. S. 781 ... 28

Buzynski v. Luckenbach Steamship Co., Inc., 277 U. S. 226 28

Cooke v. United States, 2 Wall. 218 19

Hayward v. Nordberg Mfg. Co., 85 Fed. 4 20

Kirby v. American Soda Fountain Co., 194 U. S. 141, 24 S. Ct. 619 18

K V O S v. Associated Press, 299 U. S. 269, 57 S. Ct. 197 ..... 24, 25

Lutcher & Moore Lumber Co. v. Knight, 217 U. S. 257 .. 28

McNutt v. General Motors Acceptance Corp., 298 U. S. 178, 56 S. Ct. 780 24

Travelers' Protective Assn. v. Smith, 71 Fed. (2d) 511 .. 21

Twin Hills Gasoline Co. v. Bradford Oil Corp., 264 Fed. 440 20

IN THE

Supreme Court of the United States

October Term, 1936.

SAINT PAUL MERCURY INDEMNITY COMPANY,
Petitioner,
vs.
RED CAB COMPANY,
Respondent.

No. .....

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

THE OPINION OF THE COURTS BELOW

No opinion was filed by the District Court.

The original opinion of the Circuit Court of Appeals was filed on the 12th day of April, 1937, and is reported in 90 Fed. (2d) 229. No opinion was filed by the Circuit Court of Appeals upon the overruling of petitioner's petition for a rehearing, which petition for rehearing was denied June 18, 1937.

JURISDICTION

The jurisdiction of this court is based upon the Judicial Code Sec. 240 as amended (28 USCA, Sec. 347).

The date of the judgment of the District Court is June 19, 1936.

The date when the judgment of the Circuit Court of Appeals became final is June 18, 1937.

The petition for *certiorari* was filed July 31, 1937.

THE FACTS

The transcript filed originally in the Circuit Court of Appeals did not include the transcript on removal, as this was not deemed necessary by counsel for either of the parties, because (a) an amended complaint was filed in the federal court after the removal and (b) because it was believed that the amended complaint itself showed the necessary jurisdictional facts, including the amount in controversy, since the amended complaint alleged the unliquidated damages of the respondent to be $4,000, and prayed judgment for that sum, though there was filed afterward, for the first time, in the federal court, a bill of particulars showing the damage sustained by respondent to be less than $3,000.

But the Circuit Court of Appeals, after its original opinion was filed, had brought before it, as a part of the record, the transcript on the removal of the cause, by the return of the Clerk of the District court to the writ of *certiorari* for diminution of the record issued out of the Circuit Court of Appeals, which transcript showed federal jurisdiction to exist at the time of the removal.

The complaint filed in the State court and on file at the time of the removal alleged, on the subject of the amount in controversy, as follows (R. p. 59):

> "That as a direct and proximate result of the defendant corporation's breach of contract the plaintiff was compelled to employ attorneys, investigators and medical assistance for the purpose of investigating and satisfying claims made by its employees

during the thirty day period from December thirtieth (30) 1933, covered by the defendant corporation's contract of insurance; that furthermore the plaintiff was required to pay to its employees who had suffered injury during the period covered by the defendant corporation's contract of insurance, as described above, compensation for such claims, as was required by law, and the plaintiff was furthermore required to pay, or obligate itself to pay, certain medical, hospital and dental bills in connection with the injuries suffered by such employees, all to its damage in the sum of Four Thousand Dollars ($4,000)."

The prayer of the complaint (R. p. 60) filed and on file in the State court when the petition for removal was filed was as follows:

"Wherefore the plaintiff demands judgment against the defendant, Saint Paul Mercury Indemnity Company, in the amount of Four Thousand Dollars ($4,000.00) and for all other proper relief in the premises, and prays that this court will upon hearing issue a temporary injunction refraining the defendant, Myron S. Harlan, from transferring out of his possession to the defendant, Saint Paul Mercury Indemnity Company, any money that may now or hereafter be in the possession of the defendant, Myron S. Harlan, as agent of the defendant, Saint Paul Mercury Indemnity Company, pending final outcome of this cause of action."

The writ of *certiorari* for diminution of the record on appeal was sought and obtained by petitioner at the time it filed its petition in the Circuit Court of Appeals for a rehearing on the jurisdictional question and in aid of the petition for rehearing. (R. p. 47.)

The petition for *certiorari* for diminution of the record (R. p. 49) stated that the transcript on removal showed

that it would appear to the Circuit Court of Appeals, by the transcript on removal, that there clearly was federal jurisdiction, and that the *certiorari* was sought in aid of the petition for rehearing and to show to the Circuit Court of Appeals that there was jurisdiction of this cause.

After having considered the transcript on removal as a part of the record, the Circuit Court of Appeals denied a rehearing (R. p. 75) and adhered to its original view that there was not in controversy the amount necessary to federal jurisdiction, and thus made final, on June 18, 1937, its judgment that the cause be remanded to the State court.

SPECIFICATION OF ERRORS

1. The Circuit Court of Appeals erred in holding that federal jurisdiction was not to be determined by the state of the record as to the amount in controversy as shown by the record in the State court at the time of removal, but instead was to be determined by the amendment of the complaint after removal to the federal District Court.

2. The federal question of federal jurisdiction here involved was decided by the Circuit Court of Appeals in a way not in accord with the decisions of the Supreme Court, applicable here, namely, *Kirby v. American Soda Fountain Co.*, 194 U. S. 141 and *Cooke v. United States*, 2 Wall. 218.

3. The Circuit Court of Appeals erred in refusing to decide the questions raised by petitioner's assignment of errors concerning the District Court's conclusions of law on the special findings of facts, the insufficiency of

the facts specially found to sustain the judgment and the right of the petitioner to have judgment ordered to be rendered for petitioner on the special findings of facts and the re-stated conclusions of law sought by petitioner thereon.

4. The Circuit Court of Appeals erred in failing to hold that the facts found by the District Court's special findings of facts were insufficient to sustain the judgment in favor of respondent.

5. The Circuit Court of Appeals erred in overruling petitioner's petition for a rehearing.

ARGUMENT

COMPLETE JURISDICTION IS SHOWN BY THE RECORD

If, as here, the complaint on file in the State court at the time of removal to the federal court is sufficient to confer federal jurisdiction, the subsequent amendment of the complaint by the plaintiff in the federal court, after the case is docketed in the federal court, by reducing the amount of his damage, does not deprive the federal court of jurisdiction; that is to say, federal jurisdiction depends upon the state of the record at the time the petition for removal is filed.

The decision of the Circuit Court of Appeals is not in accord with the applicable decisions of the Supreme Court.

In *Kirby v. American Soda Fountain Co.*, 194 U. S. 141, 24 S.Ct. 619, at page 621, the Supreme Court, in an opinion by Mr. Chief Justice Fuller, said that—

> "it is the general rule that when the jurisdiction of a Circuit court of the United States has once attached it will not be ousted by subsequent change in the conditions."

In the Kirby case the Supreme Court reviewed previous cases decided by it, approved them, and in stating the effect of the holdings of the court in prior cases said, at page 621,—

> "In *Cooke v. United States,* Mr. Chief Justice Chase said that 'jurisdiction once acquired cannot be taken away by any change in the value of the subject of controversy.' "

Further, in its opinion in the Kirby case, at page 621, the Supreme Court referred to a District court case announcing the same principle and said:

> "In *Roberts v. Nelson*, the amount claimed was reduced after the case had been removed, and Mr. Justice Blatchford, then District Judge, held that the jurisdiction of the court having once attached, no subsequent event could divest it."

The Kirby case (194 U. S. 141) was one in which the complaint in the State court, at the time of the removal, averred the amount in controversy to be within the jurisdiction of the federal court, as is true in the case at bar. The case was properly removed. While the case was pending in the federal court the defendant filed a cross-complaint against the plaintiff and sought to recover from the plaintiff an amount less than the amount essential to federal jurisdiction. Thereupon the plaintiff dismissed his complaint, so that there remained pending before the court, as the sole pleading seeking affirmative relief, the cross-complaint of the defendant for an amount less than the amount essential to federal jurisdiction. The Supreme Court held, however, that there was federal jurisdiction and sustained a judgment on the cross-complaint in an amount less than the amount essential to federal jurisdiction.

In *Cooke v. United States*, 2 Wall. 218, 219, 17 L. Ed. 755, the plaintiff offered a remission of so much of his claim as would make the claim remaining less than the amount necessary to confer federal jurisdiction. The offer of remission was made upon condition of payment of the remainder. The plaintiff's offer was not accepted by the defendant. The Supreme Court, in an opinion by Mr. Chief Justice Chase, holding in favor of federal jurisdiction, said,—

> "It does not appear that the proposition has been accepted; and if not, the amount in controversy remains unaffected. But had the alleged reduction

> been made by an actual payment, the jurisdiction of the court would not be affected. The jurisdictional facts existed at the time of issuing and serving the writ of error. By its issuance and service the court obtained jurisdiction over the cause, and this jurisdiction once acquired, cannot be taken away by any change in the value of the subject of controversy."

Applying the foregoing applicable decisions of the Supreme Court to the facts in the case at bar, it will be seen that clearly the decision of the Circuit Court of Appeals is erroneous and not in accord with the decisions of the Supreme Court.

In *Hayward v. Nordberg Mfg. Co.*, 85 Fed. 4, at page 9, the Sixth Circuit, in an opinion by Circuit Judge Lurton, said:

> "Whatever the facts of the plaintiff's claim, and however he may have stated his demand before commencing suit, he voluntarily chose to begin a suit upon a claim which, in amount, was within the jurisdiction of the Circuit court, and therefore removable. Whether the facts would or would not support his claim as stated, or for the amount he demanded, is a matter of no moment. *Jurisdiction to hear and determine that claim existed in the Circuit Court to which the cause was removed, and the jurisdiction thus acquired could not be defeated by any subsequent amendment of his pleadings, bill of particulars, or other form of concession as to any part of his demand.*"

In *Twin Hills Gasoline Co. v. Bradford Oil Corp.*, 264 Fed. 440 (D. C.), the court quoted from the case of *Johnson v. Computing Scale Co.*, (D. C.) 139 Fed. 339, and approved the following:

> "Where the amount claimed by a plaintiff in his complaint in a state court, and which he is entitled to recover if its allegations are true, is sufficient to give a federal court jurisdiction, and the cause is otherwise removable, he cannot defeat such jurisdiction after removal by changing his position or the record with respect to the amount claimed."

After quoting the foregoing from the Johnson case, the court in the Twin Hills Gasoline Company case then said:

> "The claim as made and standing on the record of the case at the time the removal is effected is what determines the jurisdiction of the United States Court. * * *
>
> "The motion to remand, after the case had been removed to this court and the plaintiff had filed an amendment reducing the amount sued for below $2,000.00, exclusive of interest and costs, was submitted to District Judge Youmans, assigned to this District, and the same was by him overruled. The motion to remand is now renewed by the plaintiff, and the same is overruled."

In *Travelers' Protective Assn. v. Smith*, 71 Fed. (2d) 511 (4th C. C. A.), the plaintiffs commenced their suit in the State court, and in their complaint in the State court they sought to recover $5,000. After the case had been removed to the federal court, and after the defendant had answered the complaint, the plaintiffs filed in the federal court a written waiver of their right to recover on the cause of action alleged any amount in excess of $3,000 and remitted to the defendant any excess which they might be entitled to recover in excess of that amount. The plaintiffs then moved that the cause be remanded to the State court on the ground that such remittitur had been filed. The Circuit Court of Appeals

for the Fourth Circuit held that the jurisdiction of the federal court was not defeated, or the removal rendered improper, by the remittitur subsequently filed. The Court of Appeals, at page 512, said:

> "As the action involved more than $3,000.00 and was wholly between citizens of different states, it was properly removed into the federal court and the jurisdiction of that court attached. And it is perfectly clear that the jurisdiction was not defeated or the removal rendered improper by the remittitur subsequently filed."

The decision of the Circuit Court of Appeals in the case at bar fixes for all the District Courts in the entire Seventh Circuit the rule that, notwithstanding a case removed is a removable one at the time of the removal, involving an amount in controversy beyond $3,000, if after removal the plaintiff chooses to amend his complaint in the federal court by reducing his allegation of damages to, or below, $3,000, the District Court must thereupon remand the case to the State court. The defendant whose case is so remanded will thus have lost forever his right to have his cause determined by the federal court. Such a defendant is thus cast without a remedy. He can not appeal to the Circuit Court of Appeals to correct the error. He can not come to this court for a writ of certiorari to correct the error against him and to secure his rights under the Acts of Congress and the federal Constitution giving him the right to have his case decided by the national courts. Every such defendant in the Seventh Circuit is now remediless. This should not be. Only this court, and in the case at bar, can correct such an error and avoid such an injustice. The District Courts must follow the Circuit Court of Appeals and that court has refused to acknowledge and correct its error.

Cases are numerous and frequent where a cause removable as alleged in the State court is removed, in which, after the statute of limitations has run to bar a fresh action, the federal District Court has sustained a demurrer to the plaintiff's complaint or reply or overruled plaintiff's demurrer to an affirmative answer, to the displeasure of the plaintiff's counsel. The plaintiff has found that the federal court has determined that the law is against the plaintiff. Now, under the existing decision of the Circuit Court of Appeals in the case at bar, all that the plaintiff in such case need do, to abandon a jurisdiction he has found unfavorable, and try his luck in another court, is to amend his complaint by reducing his allegation and demand of damages to $3,000, whereupon the federal District Court will be required to send the case to the State court. The right of a defendant to enjoy the exercise of federal jurisdiction in a removable case properly removed is a substantial right. The courts should not, and do not, favor experimenting by a party to litigation, first in one court, then in another, until perchance he may find one that shall agree with him. A defendant properly in the federal court with his case and entitled to remain there for final decision on the merits should not be thrust out of the federal court by the experiment of the plaintiff's amending his complaint by reducing his demand because merely the plaintiff in the given case has become informed that the federal court considers he has no right to recovery.

In the case at bar, the petitioner is entitled to have its case—the case made by the record in this case—decided by the federal court. The Court of Appeals has denied petitioner that right. It has refused to pass on simple questions of merits presented by the errors assigned in the Circuit Court of Appeals. It has relegated petitioner to the State court. Petitioner beseeches this Court to pre-

serve to petitioner the right to have its case on the merits decided by the federal courts, as is its due.

The Circuit Court of Appeals, in deciding there is no jurisdiction in the case at bar, relied on two cases, inapplicable here, decided by this Court, namely:

McNutt v. General Motors Acceptance Corp., 298 U. S. 178, 56 S. Ct. 780;

K V O S v. Associated Press, 299 U. S. 269, 57 S. Ct. 197.

We submit that neither of the cases cited and relied on by the Court of Appeals is in point here because:

1. The case at bar, as alleged by the complaint in the State court, was one for the recovery of unliquidated money damages laid by the complaint in the sum of $4,000, commenced in the State court and removed to the federal court.

2. The case of *McNutt v. General Motors Acceptance Corp.*, 298 U. S. 178, 56 S. Ct. 780, was solely for equitable relief by injunction to restrain the enforcement of a State statute, and not for the recovery of money damages. It was commenced originally in the federal court, not in the State court, and was not a removal case. As to amount in controversy, jurisdiction was rested solely on—

> "* * * the value of the object or right to be protected against interference."

Said this court, in its opinion:

> "The object or right to be protected against unconstitutional interference is the right to be free of that regulation. The value of that right may be measured by the loss, if any, which would follow the enforcement of the rules prescribed. The particular

> allegations of respondent's bill as to the extent or value of its business throw no light upon that subject. They fail to set forth any facts showing what, if any, curtailment of business and consequent loss the enforcement of the statute would involve. The bill is thus destitute of any appropriate allegation as to jurisdictional amount save the general allegation that the matter in controversy exceeds $3,000.00. That allegation was put in issue and the record discloses neither finding nor evidence to sustain it."

The McNutt case is thus seen instantly to be wholly irrelevant to the case at bar.

3. In the case of *KVOS v. Associated Press*, 299 U. S. 269, 57 S. Ct. 197, also the plaintiff invoked the original jurisdiction of the federal court, in equity, for injunctive relief. The case was not commenced in the State court, and was not removed to the federal court. This Court stated, in summary, the allegations of the bill as follows:

> "Respondent is a New York corporation and petitioner a Washington corporation; 'the damage to which complainant is being subjected * * * is in excess of the sum of Three Thousand ($3,000.00) Dollars, exclusive of interest and costs, and the amount involved herein and in controversy herein is in excess of said sum of Three Thousand ($3,000.00) Dollars, exclusive of interest and costs.'"

The plaintiff in the KVOS suit sought to enjoin the defendant, in the operation of defendant's radio station, from pirating news from members of the plaintiff Associated Press. Upon a hearing for a temporary injunction, the District Court dismissed the bill for want of federal jurisdiction.

The defendant, in the KVOS case, challenged the plaintiff's allegations of the amount alleged to be in controversy, this court saying that,—

> "The petitioner's motion was an appropriate method of challenging the jurisdictional allegations of the complaint. * * * The motion required the trial court to inquire as to its jurisdiction before considering the merits of the prayer for preliminary injunction. And in such inquiry complainant had the burden of proof."

This court held that the plaintiff in the KVOS case had wholly failed to meet that burden.

Speaking further of the bill in the KVOS case, this Court said:

> "The bill seeks redress for damage to the respondent's business and for damage to the business of some or all of its members. The right for which the suit seeks protection is, therefore, the right to conduct those enterprises free of the alleged unlawful interference by the petitioner. No facts are pleaded which tend to show the value of that right. The complaint contains nothing to the purpose save the general statement that the damage to which the respondent is being subjected is in excess of three thousand dollars and the amount involved is in excess of that sum. Such a formal allegation is sufficient, unless the bill contains others which qualify or detract from it in such measure that when all are considered together it cannot fairly be said that jurisdiction appears on the face of the complaint, in which case the suit should be dismissed by the court *sua sponte* or upon the defendant's motion. In this case the formal allegation is not re-enforced or strengthened by other portions of the complaint; neither is it neutralized or weakened by qualifying or detracting allegations. In effect it stands alone. Therefore the court would not have been bound to dismiss upon a motion based solely on alleged insufficient pleading of the amount in controversy; though it might, of its own motion, have entered upon an inquiry to ascertain whether the cause was one over which it had juris-

diction. But where the allegations as to the amount in controversy are challenged by the defendant in an appropriate manner, the plaintiff must support them by competent proof."

4. In the case at bar there was no challenge by either party of the jurisdictional allegations of either the complaint in the State court or the petition for removal, both of which alleged the amount in controversy to be $4,000, and nothing in the original complaint in the State court or in the petition for removal contradicted, or tended to contradict, the allegation that the amount in controversy was $4,000, exclusive of interest and costs. In no manner did either party in the case at bar present any issue of jurisdiction because of amount in controversy or for any other reason.

Very clearly there is jurisdiction in the case at bar, and the cause should not be remanded to the State court.

CIRCUIT COURT OF APPEALS SHOULD DECIDE PETITIONER'S ASSIGNMENT OF ERRORS

When the Circuit Court of Appeals, finding first that federal jurisdiction was not shown by the record then before it when it gave its original opinion, afterwards had brought before it, on the return to its writ of *certiorari*, the transcript on removal containing the complaint filed in the State court, and the petition for removal, which showed the amount in controversy to be $4,000, and that federal jurisdiction was therefore present, the Circuit Court of Appeals should have decided petitioner's assignment of errors on the merits. When it refused to do so, it placed its refusal on an untenable ground.

The Circuit Court of Appeals furthermore should have given the reasons on which it rested its final judgment

that there was absence of federal jurisdiction, after it had brought before it, on *certiorari*, the transcript on removal.

A somewhat similar situation arose in *Lutcher & Moore, Lumber Co. v. Knight*, 217 U. S. 257. In that case the Circuit Court of Appeals failed to consider the case before it, placing its refusal on an untenable premise (not important here). This court remanding the case to the Circuit Court of Appeals (p. 268) "to the end that the duty to hear and decide it may be performed," said (p. 67) that—

> "* * * we are of opinion that it inevitably results that the effect of the action of the Circuit Court of Appeals was substantially to deny to the plaintiffs in error in that court, petitioners here, their day in court; in other words, was equivalent to condemning them without affording them an opportunity to be heard."

The same has occurred in this case. The Circuit Court of Appeals, in refusing to decide petitioner's assignments of error, has misconstrued the record as to the amount in controversy, and has deprived the petitioner of its right, under the Acts of Congress, to have its cause decided by the federal courts.

In *Buzynski v. Luckenbach Steamship Co., Inc.*, 277 U. S. 226, at page 228, this Court said:

> "Where the Circuit Court of Appeals erroneously reverses a judgment upon one question without deciding another upon which its correctness also depends, the case may be reversed for the error and remanded to that court for decision of the other question."

In *Baltimore, etc., R. Co., v. United States*, 279 U. S. 781, 787, this Court said:

> "The lower court entered its decree dismissing the suit and, after reversal here, denied restitution

without opinion, statement of reasons or citation of authority. The questions were important, and the amounts involved were large. The judges should have given the reasons on which they rested their decisions. * * *"

It is the contention of petitioner that if the Circuit Court of Appeals had considered petitioner's assignment of errors it would have been compelled to hold that the facts found by the special findings of facts by the District Court are not sufficient to sustain the judgment against petitioner, and that petitioner is entitled to have the judgment appealed from reversed, the District Court's conclusions of law re-stated in favor of petitioner, and judgment thereon rendered in favor of petitioner.

Petitioner submits that the case should be remanded to the Circuit Court of Appeals for a decision of petitioner's assignments of errors; or that the cause be decided by this court on its merits upon further consideration. It is, however, not thought proper by us now to burden this court with a demonstration of the correctness of petitioner's contentions respecting the merits, believing that this court will prefer to reverse the judgment of the Circuit Court of Appeals and to remand the case to the Circuit Court of Appeals for the decision, by that court, of petitioner's assignments of errors on the merits.

WHEREFORE petitioner prays that the writ be granted.

BURKE G. SLAYMAKER,
Indianapolis, Indiana,
Attorney for Petitioner.

SLAYMAKER, MERRELL & LOCKE,
Indianapolis, Indiana,
Of Counsel for Petitioner.